APPENDIX "A".

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 17358.

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,
Appellant,

vs.

BADGER MUTUAL INSURANCE COMPANY AND NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

(May 5, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: Among other business ventures the appellant, Sam Serio, had operated a canning factory at Magnolia, Mississippi, since 1939, under the name of Magnolia Canning Co. The operation was seasonal,

beans being canned in the spring and sweet potatoes in the fall. On June 11, 1939, Badger Mutual Insurance Company, one of the appellees, issued to the appellant a policy of fire insurance on the canned vegetables, materials and supplies in the canning plant in the amount of $35,000. On July 18, 1955, Northwestern Mutual Fire Association, the other appellee, issued a policy against the same risks in the amount of $25,000. The Badger policy incorporated a reporting form requiring the insured to make monthly reports. The Badger policy and the Northwestern policy each contained an Iron Safe Clause which provided, among other things,[1] that inventories would be taken at annual or more frequent intervals and a set of books would be kept showing the business transacted. The clause required that the inventory and books be kept in a locked fire-proof safe at night and at all times when the building was not open for business, or that the inventories and books be kept in some place which would not expose the records to a fire which might destroy the building in which the insured goods were kept.

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[1] "1. The insured will take a complete itemized inventory of stock on hand at least once in each calendar year. * * *.

"2. The insured will keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy.

"3. The insured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the insured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

The canning factory of Serio was destroyed by fire on the night of September 24, 1955. As permitted by the policies, the insurance companies examined the insured, Sam. Serio, and his bookkeeper, Miss Fannie Lederer, under oath. From these examinations it appeared that the safe contained but one inventory, rather than the two that should have been produced, and contained no books. It was said by Miss Lederer that she had inadvertently left other inventories and the books out of the safe before the fire. It was assumed that they had been destroyed in the fire.

The insurance companies filed suit seeking a declaratory judgment that the Iron Safe Clause in the policies had been violated and that they owed nothing to Serio on account of his fire loss. Serio counterclaimed for the full amount of each policy. At the conclusion of the evidence both Serio and the insurance companies moved for a directed verdict. At the argument on these motions the trial judge said, among other things, "* * * it will suffice to say here that those books were not kept by Mr. Serio in the iron safe and were destroyed * * *. But in these insurance policies, it is a contract, and the contract requires that that be complied with, and unless it is waived, then it must be complied with to the extent that those books and records will substantially show the amount of the loss at the time of the fire. They have not been able to be produced and have never at any time been produced because they were destroyed by fire. So, there was no compliance." The court directed a verdict for the insurance companies. On September 13, 1957, a judgment for the insurance companies was entered. The foregoing excerpts from the court's oral opinion indicate that the judgment was entered upon the sole ground that Serio had not complied with the Iron Safe Clause. Motions for a judgment

notwithstanding the verdict and, in the alternative, for a new trial, were filed. These were overruled and in a letter opinion the district court again stated its conclusion that the Iron Safe Clause had been breached with the result of invalidating the policies. A notice of appeal from the judgment was filed March 11, 1958. In specifying error Serio asserts that there was a substantial compliance with the Iron Safe Clause, that the contents of the building and the value thereof could be established by other evidence.

On April 2, 1958, after the notice of appeal had been filed but before the transcript of the record in this appeal had been prepared, Serio filed a motion in the district court under Rule 60(b)(1)(2).[2] In the motion and affidavits filed with it were recitals that a few days before the fire while working on the books Miss Lederer, Serio's bookkeeper, received a message calling her to the bedside of her sister who was seriously ill in Wisconsin. In her excitement she left the books on the top of a cabinet. During her absence Serio told Glen Varnado, an illiterate employee, to move some old unused record books from the office to a storage room which was back of the boiler room of the canning factory. Varnado moved the unused books and also, without the knowledge of Serio, moved the books, records, inventory and canceled checks of the canning factory. Not knowing the books and records had been moved out of the building, Serio and Miss Lederer

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[2]On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons. (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b): * * *. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *" Rule 60(b), Fed. Rules Civ. Proc., Title 28, U.S.C.A.

assumed they had been destroyed in the fire. On March 14th, three days after the notice of appeal, Serio went to the store room looking for a usable ledger among the unused lot of books he had asked Varnado to move. The books, records, inventory and canceled checks of the canning factory were then found with the unused books. The motion asked for a new trial at which the books and records could be offered in evidence. The court overruled the motion and in a letter opinion assigned its reasons for the ruling in this language:

> "It was the duty of Serio to present these records within a reasonable time, which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy. The documents were in the possession of Serio and his failure to produce them within a reasonable time was his own fault. It was his employee, who misplaced the records and the negligence of this agent of his would be imputable to Serio. He failed to show due diligence in finding them. Under his own affidavit it should have occurred to him immediately, as a reasonably prudent person, that this employee of his had misplaced them and he should have searched the place at that time where he subsequently located them. I am therefore of the opinion that the showing for newly discovered evidence is insufficient."

From the order overruling the motion Serio has appealed. The case is before us on the appeal from the judgment and from the order overruling the motion filed under Rule 60(b)(1), (2).

This Court has jurisdiction of the appeal from the order denying the motion filed under Rule 60(b) notwithstanding the fact that the notice of appeal from the judgment on the merits had been filed prior to the filing of the motion. *Ferrell v. Trailmobile, Inc.*, 5th Cir. 1955, 223 F.2d 697.

The sole basis for the direction of verdicts and the entry of judgments for the insurance companies was the failure of the insured Serio to comply with the Iron Safe Clause. The Rule 60(b) motion, filed less than seven months after the judgment, alleged that the books and records had been found and there had not been, in fact, any breach of the Iron Safe Clause. The sole basis for the denial of the motion was a failure of the insured to find and produce the records at an earlier time. No prejudice to the insurance companies is shown to have resulted from the delay in the discovery of the evidence. Under the circumstances the delay in the filing of the motion was not unreasonable. See *Klapprott* v. *United States*, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266. The rule is to be liberally construed in order that judgments may reflect the true merits of a case. 3 Baron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392 § 1322. It seems that Serio owned property, that the insurance companies for premiums paid by him, issued to Serio policies insuring him against the risk of loss or damage by fire, and that a fire detroyed or damaged all or a part of the insured property. He was deprived of the right to attempt to prove that he had sustained a loss within the terms of the policies, and the amount of his loss sustained, because of the Iron Safe Clause. That impediment, he asserts by his motion, is now removed. The district court was of the belief that it should have occurred to Serio that the books and records had been inadvertently (although fortuitously) moved by one employee after having been inadvertently left out of the safe by another employee. The district court held that a prudent person would have searched for the records at the place where they were subsequently found by accident. We do not agree. Serio asserts that he believed and we think he was entitled to believe that the records

had been burned. So believing a prudent person would not have been expected to conduct a search.

The ends of justice require that a new trial be granted. *Ferrell* v. *Trailmobile, Inc., supra.* There is no occasion for our consideration of the specifications of error with respect to the judgment. It is improbable that the questions will recur on another trial. In order that there may be a new trial, the judgment is

VACATED AND REMANDED.

A true copy, Test: /s/ Edward W. Wadsworth.

(Seal) Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

June 18, 1959.

APPENDIX "B".

Oral Opinion of the Judge of the District Court of the United States for the Southern District of Mississippi, Jackson Division, Directing Judgment for Petitioners (R. 565).

By the Court: The policy sued upon here contained this clause:

"1. The insured will take a complete itemized inventory of stock on hand at least once in each calendar year and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void * * *" and so forth.

"2. The insured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and during the continuance of this policy."

"3. The insured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the insured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void * * *."

In this case, the evidence shows without conflict an inventory was taken in June, 1955, and an inventory was

taken on June 30, 1954. The 1955 inventory was preserved, but the 1954 inventory was destroyed by the fire, and the books of the company were destroyed by the fire. So the law is well settled that unless the insured complies with that provision of the insurance policy, unless it should be waived by the company, then it is binding and will destroy the effect and validity of the policy. The law is well announced in the case of *World Fire Insurance* v. *King*, 191 Southern 665, where the Court says, among other things, "* * * and would enable it if complied with, to trace the transactions reflected by the books so as to verify the truth of the matters contained therein and to determine with more or less precision the real amount of the loss incurred by the fire under the policies. Of course, one of the essential things, the most important thing of all, is the production of the inventory, books of account, records of sale, shipments and so forth, so that the transactions might be investigated and the loss be determined with relative precision." Then, the case of *Central Manufacturers Mutual Company* v. *Rosenblum*, 177 Southern 909, which is as a matter of fact, a case very similar to the facts of this case. That was a case wherein the insured would take some of the stock of goods from his store in Gulfport and transfer them over to Poplarville where he had another store and did not make an entry of that transfer. If he didn't sell them in Poplarville, then he eventually would bring them back to Gulfport, his main store, and put them on sale again there. Those entries were not made on the books, and here is what the Court said: "It has been the law in this state that the books of the assured must themselves furnish the information required by the policy with reasonable certainty, unaided by oral testimony except to explain the method of keeping them, and that the removal by the assured of a

considerable portion of the stock to another store without entering the same on his books of account violates the policy provision requiring the keeping of a set of books showing all the purchases, sales and shipments and avoids the policy."

So, gentlemen, there are other cases along those lines, quite a number of them, which I will not refer to here; but it will suffice to say here that those books were not kept by Mr. Serio in the iron safe and were destroyed, and he undertakes to prove by oral evidence and by copies of documents that would reflect upon it the amount of his loss. If oral evidence were permitted to be shown, why, it could be done; and if this were an accounting proposition for income tax purposes where an accountant could go out to the fellow whose name appeared on the check and say, "Did you sell this man some material for which this check was given, and, if so, what?", then you could prove it by oral testimony. But in these insurance policies, it is a contract, and the contract requires that that be complied with, and unless it is waived, then it must be complied with to the extent that those books and records will substantially show the amount of the loss at the time of the fire. They have not been able to be produced and have never at any time been produced because they were destroyed by fire. So, there was no compliance.

So then, we come down to whether or not there was a waiver of those provisions. The evidence in the case is insufficient to show there is a waiver. While it takes only a small amount of conduct or circumstances to constitute a waiver, yet those circumstances must show there was an intent to waive, because the law of waiver is that there must be an intent to waive a known right; otherwise, it wouldn't amount to a waiver. In these insurance policies, only a slight circumstance is required to show intent to

waive; but here, taking Mr. Serio's testimony at full value, which I must do, it shows no intent to waive and shows no circumstances from which a waiver could be inferred. The testimony was the general agent of the company came to his place of business rather often and saw his books; which was in the daytime when they were at work, saw his books out on the desks or on the tables, made no complaint about it and either told him or his bookkeeper that he was keeping a good set of books, was well pleased with the way he was keeping them; but at no time was it ever told the insurance agent that the books were not locked up in the safe at night, and there is nothing in the testimony of the case from which it could be inferred that the agent knew the books were not kept locked up in the safe at night. So, therefore, there was no waiver.

So, I will give the peremptory instructions requested by the plaintiff in the case, the insurance companies, and will deny the instruction requested by the cross plaintiff and defendant, Mr. Serio, and declare that the policies were of no validity at the time of the fire.

Appropriate order may be drawn and mailed to me, and I will sign it.

Gentlemen, I will say this: Of course, under the rules the losing party has ten days within which to file a motion for a new trial or a motion for judgment notwithstanding the verdict. You may do that, and I will let you brief it, give you a reasonable time in which to brief it if you so desire. I might say further for the record, from the testimony in this case I think Mr. Serio did sustain a substantial loss, but that he has been unable to prove it by any method provided by law or authorized by law.

APPENDIX "C".

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
GULFPORT, MISSISSIPPI

February 20, 1958

Chambers of
SIDNEY C. MIZE
District Judge

(Filed Feb. 20, 1958.)

Honorable O. W. Phillips
Magnolia, Mississippi
Messrs. Barnett, Jones & Montgomery
Jackson, Mississippi
Messrs. Watkins & Eager
Jackson, Mississippi

Re: Badger Mutual Insurance Co., et al
v. No. 2421—Jackson
Sam Serio

Gentlemen:

I have considered your briefs and the record in the above styled case upon the motion of the Plaintiff for a judgment notwithstanding the verdict and also the motion for a new trial in lieu thereof, and I have reached the conclusion that each of these motions must be overruled. I adhere to the summary I made at the conclusion of the trial.

The record is replete with testimony that the insured did not comply with the iron safe clause. The policies, among other things, provided that the insured would take a complete, itemized inventory of stock on hand at least

once in each calendar year and unless such inventory had been taken within twelve months prior to the date of the policy, one would be taken in detail within thirty days of the issuance of the policy or the policy would become null and void from its date. Also it provided that he would keep a set of books which would clearly and plainly present a complete record of the business transacted, and further provided that the insured would keep such books and inventory, and also the last preceding inventory—if such had been taken—securely locked in a fire-proof safe at night and at all times when the building mentioned in the policy was not actually open for business. Or, failing in this, he would keep them in some place not exposed to a fire which would destroy the building. It further provided that in the event of the failure to produce such books and inventory for the inspection of the Company that the policy would be null and void and a perpetual bar to any recovery thereon.

The evidence in the case discloses that an inventory was taken on December 31, 1954; it also discloses that it took an inventory on June 30, 1955. This last inventory was produced, but the inventory of December 31, 1954, was not kept in the safe and was destroyed by the fire. Likewise, the cash book was destroyed by fire and it was impossible to determine from the records themselves the actual value of the goods that were destroyed by fire, unless it could be supplemented by oral testimony. The accountant, Gallagher, testified that without the aid of the oral evidence he could not determine with a reasonable degree of accuracy the amount of the loss sustained.

It is unnecessary to go outside the authorities announcing the law in the State of Mississippi by the Supreme Court of Mississippi. The Supreme Court of Mississippi has on many occasions announced the law with reference

to compliance with the iron safe clause or the failure to comply therewith. The cases cited at the time I summarized were sufficient to sustain the ruling that I made, but there are many other authorities, some of which I will cite.

World Fire & Marine Insurance Co. v. *King*, 191 So. 665, in which the Court said that it was necessary to produce the inventories, books and records of the transaction of the business for inspection and examination by the insurer, which would enable it, if complied with, to trace the transactions reflected by the books so as to verify the truth of the matters contained therein, and to determine with more or less precision the real amount of the loss incurred by the fire under the policy. That one of the most essential things was the production of the inventories, books of accounts, records of sales, etc. was held in the case of *Lewis* v. *National Fire Insurance Company*, 101 So. 296, in which the court denied recovery for the failure of the insured to take a complete, itemized inventory of the stock on hand at least once a year, or within thirty days after the issuance of the policy. This the insured in this case failed to do, and the Court held further that no mere proof that there was some merchandise or a large stock of merchandise in situ at the time of the fire could be substituted for an inventory. In the case of *Penix, Trustee* v. *American Central Insurance Co.*, 63 So. 346, the Court held that in order for the iron safe clause to be complied with it was only necessary that the insured keep such a set of books as would enable an accountant to ascertain from them, together with the inventory, with reasonable accuracy the value of the goods at the time of the fire. See also *Phoenix Insurance Co.* v. *Bourgeois*, 63 So. 212; *Wright* v. *Union Insurance Co.*, 13 Fed. (2) 612; *Aetna Insurance Co.* v. *Mount*, 44 So. 162.

The Supreme Court of Mississippi, in the case of *Merchants Union Insurance Co.* v. *Johnson*, held that in order to comply with the iron safe clause the book or books must themselves furnish information with reasonable certainty without the aid of parole testimony or loose leaf memoranda collected from other sources. This is the same rule of law as announced in the Rosenblum case which I cited at the time of my former ruling, 177 So. 909. The same doctrine was announced in the case of *Merchants Union Insurance Co.* v. *Johnson*, 135 Miss. 311. All the above cases are from the Supreme Court of Mississippi except the Wright case, which was a Mississippi Case decided by the Court of Appeals. These authorities are conclusive that there was not a compliance with the iron safe clause.

The evidence was far from showing that there was a waiver of the iron safe clause by the companies and the case of *Continental Insurance Company* v. *Thrash*, 78 So. (2) 344, is not in point. In that case it was conclusively shown that there was a waiver by the General Agent of the Company who knew the type of books and records that would be kept by the insured if the policy was delivered. The insured explained to the agent just how he kept his books and the agent, with the general knowledge and full knowledge of how the books were kept, accepted that as sufficient. Definitely in that case there was a waiver by the company itself. In the present case the testimony nowhere shows that the Company, through any of its agents, ever waived the clause of the policy requiring that the records, books and inventories be kept locked in an iron safe at night.

As above stated, each of the motions will be overruled and an order may be drawn in accord herewith. I had hoped to find the time to write an opinion and go more into

detail as to the testimony, but for lack of time I will not do so, but will file a copy of this letter with the Clerk of the Court as my opinion and part of the record in this case.

With kindest regards, I am

Sincerely yours,

/s/ S. C. Mize

U. S. District Judge

APPENDIX "D".

LETTER OPINION (R. 632).

(Filed June 9, 1958.)

June 6, 1958

Honorable P. Z. Jones
414½ East Capitol
Jackson, Mississippi
Honorable Tom H. Watkins
Plaza Building
Jackson, Mississippi

Re: Badger Mutual Ins. Co., et al
v. No. 2121—Jackson.
Sam Serio, etc.

Gentlemen:

I have considered Mr. Jones' motion on behalf of Defendant and Cross Plaintiff to set aside the judgment heretofore entered in this case and to re-open the case for further evidence and Mr. Watkins' motion on behalf of the Plaintiff to strike this motion, along with the entire record and your briefs, and have reached the conclusion that both motions should be overruled.

Serio had the right to file this motion and I am treating Mr. Watkins' motion to strike along with it. I do not believe the motion should be stricken, but am of the opinion that Serio's motion should be overruled and denied.

Assuming, for the purpose of this opinion, that the documents now tendered are original records, in my judgment their production at this late date would not be sufficient to avoid forfeiture of the policy. It was the duty of Serio to present these records within a reasonable time,

which he failed to do. His excuse for the failure is not sufficient in law to comply with the terms of the policy. The documents were in the possession of Serio and his failure to produce them within a reasonable time was his own fault. It was his employee who misplaced the records and the negligence of this agent of his would be imputable to Serio. He failed to show due diligence in finding them. Under his own affidavit it should have occurred to him immediately, as a reasonably prudent person, that this employee of his had misplaced them and he should have searched the place at that time where he subsequently located them. I am therefore of the opinion that the showing for newly discovered evidence is insufficient.

I am filing a copy of this letter with the Clerk as my opinion upon these motions. An order may be drawn in accord herewith and mailed to me for signing.

Sincerely yours,

/s/ S. C. Mize

APPENDIX "E".

JUDGMENT.

Extract from the Minutes of May 5, 1959.

No. 17358.

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,

vs.

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellees, Badger Mutual Insurance Company and Northwestern Mutual Fire Association, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "F".

ORDER DENYING REHEARING.

Extract from the Minutes of June 4, 1959

No. 17358

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,

vs.

BADGER MUTUAL INSURANCE COMPANY and NORTHWESTERN MUTUAL FIRE ASSOCIATION.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.